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No. 91-87 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's service as an armed guard at a Nazi concentration camp constituted "assist[ance] in * * * persecution" within the meaning of Section 13 of the Displaced Persons Act of 1948.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 923 F.2d 1253. The memorandum opinion and order of the district court (Pet. App. 21-40) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1991. A petition for rehearing was denied on June 4, 1991 (Pet. App. 18-19). The petition for a writ of certiorari was filed on July 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Scharosch, Romania, of German parentage. In June 1943, he was inducted into the Waffen SS, the military branch of the SS, and was assigned to serve at the Sachsenhausen concentration camp near Oraneinburg, Germany. Petitioner was a member of the "Death Head's Battalion" until September 1944. During petitioner's service at Sachsenhausen, the camp was the second largest Nazi concentration camp; only Auschwitz was larger. Among those incarcerated at Sachsenshausen were Jews, Jehovah's Witnesses, certain Eastern European ethnics, gypsies, political dissidents, homosexuals, and various individuals considered social misfits, including beggars, vagrants, and the mentally ill. Individuals belonging to each category of prisoner were forced to wear colored triangles on the outside of their uniforms that identified them as belonging to that category. At the height of its operation, Sachsenhausen housed approximately 50,000 prisoners. Pet. App. 2-3, 25.

The Death Head's Battalion was organized as part of the Waffen SS for the purpose of guarding Nazi concentration camps. Petitioner was assigned to guard prisoners on forced labor crews outside Sachsenhausen. His duties included escorting prisoners to and from work sites, counting prisoners before returning them to the concentration camp, and keeping prisoners in formation. Petitioner wore on his uniform the skull and crossbones insignia of the Death Head's Battalion. He carried a rifle and ammunition and had orders to shoot at prisoners who attempted to escape. Because concentration camp guards were not permitted to enter the camps, petitioner was confined to patrol outside the camp wall. Pet. App. 3-4.

Although there is no evidence that petitioner personally killed prisoners, it has been documented that during the period he served at Sachsenhausen, two Jews were intentionally murdered and at least 13 prisoners were executed by being shot through the nape of the neck. In addition, tens of thousands died in Sachsenhausen as a result of starvation, exhaustion, beatings, exposure, disease, and bizarre medical experimentation. Pet. App. 4.

Petitioner continued to serve as an armed guard at Sachsenhausen until September 1944. He then served in the Third Battalion of the 38th SS Armed Infantry Division, "Goetz von Berlichingen," and was wounded in combat in Lorraine, France, on November 28, 1944. He remained in military hospitals until he became a British prisoner of war. He was released on July 8, 1946. Pet. App. 4.

2. After living in Germany and Austria for several years following the war, petitioner applied for a determination that he was a "displaced person" eligible to emigrate to the United States under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009, as amended by the Act of June 16, 1950, ch. 262, 64 Stat. 219.[1] On his application, petitioner indicated that he was conscripted into the "German Army, Waffen-SS 'Goetz von Berlichingen,' " but he did not indicate that he had served as a guard at Sachsenhausen. Based on petitioner's representations

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[1] Congress enacted the DPA to accommodate the large number of European refugees wishing to emigrate to the United States after World War II. Pet. App. 5. A person seeking to obtain an immigration visa under the DPA was required to obtain a designation of "displaced person" status as defined by the Constitution of the International Refugee Organization (IRO), Dec. 16, 1946, 62 Stat. 3037, T.I.A.S. No. 1846, 18 U.N.T.S. 3. See DPA § 2(b), 62 Stat. 1009.

in his application, he was certified as a displaced person eligible for a visa. Petitioner obtained the visa in April 1952 and, on May 24, 1952, he entered the United States. Pet. App. 6.

On March 1, 1968, petitioner applied for naturalization. Question 7 of the application form required him to list "present and past membership in every organization, association, fund, foundation, party, club, society, or similar group in the United States and in any other place, and your foreign military service." Petitioner claimed military service in the German army from 1943 to 1945, and did not indicate that he had served as an armed guard at Sachsenhausen from June 1943 to September 1944. On April 2, 1968, petitioner was naturalized as a United States citizen. Pet. App. 6.

3. On November 2, 1988, the government brought suit under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. 1451(a), to revoke petitioner's citizenship. The district court entered summary judgment for the government on Count 1 of the complaint, which alleged that, as a result of his service as an armed guard at a concentration camp, petitioner had been ineligible for a visa under Section 13 of the DPA, 62 Stat. 1014, and therefore was not lawfully naturalized under 8 U.S.C. 1427(a)(1). In pertinent part, Section 13 of the DPA prohibited granting a visa for "any person who * * * assisted in the persecution of any person because of race, religion or national origin." 64 Stat. 227. The district court concluded that petitioner's "guarding of prisoners at Sachsenhausen by carrying a gun, preventing them from fleeing and forcing them to engage in forced labor, constituted assistance in the persecution of civilians, which rendered him ineligible for a visa

under the DPA." Pet. App. 36. The district court rejected petitioner's contention that he did not assist in persecution because he did not serve voluntarily, did not personally commit acts of atrocity, and did not know that his acts assisted the Nazis in committing atrocities. *Id.* at 37-38.[2]

4. On appeal, petitioner reiterated his contention that his service as an armed guard at the Sachsenhausen concentration camp did not constitute assistance in persecution. Like the district court, the court of appeals rejected that argument. The court first pointed out that, under *Fedorenko* v. *United States*, 449 U.S. 490 (1981), voluntariness is not an element of assistance in persecution. The court then rejected petitioner's assertion that assistance in persecution could not be found because he claimed that he did not personally commit atrocities. The court concluded that "even if [petitioner] personally did not participate in the brutal acts committed at Sachsenhausen, the fact of his armed, uniformed service is sufficient to establish that he assisted in persecution." Pet. App. 10-11. The court explained:

> [Petitioner] carried a gun and wore the uniform of the dreaded "Death Head's Battalion." He guarded Jews, Gypsies, Jehovah's Witnesses, Eastern European nationals, and other persecuted peoples and forced them to do the bidding of the Third Reich. [Petitioner] prevented these

[2] The government's complaint also included seven other grounds for denaturalization, such as willful misrepresentation and concealment, false testimony, and voluntary participation in bearing arms against the United States; the government also moved for summary judgment on three of these additional counts. In light of its decision to grant summary judgment on Count 1, the district court found it unnecessary to address the other counts. Pet. App. 22-23.

> prisoners from fleeing, and subjected them to forced labor under unspeakably brutal conditions. Such employment removed [petitioner] from the intended scope of those to be aided by the DPA.

Pet. App. 12.[3]

Judge Pell dissented, believing that petitioner was entitled to a trial on the issue of knowledge. Pet. App. 13-16.

ARGUMENT

1. Petitioner maintains that, despite his service as an armed guard at the Sachsenhausen concentration camp, it cannot be established that he "assisted in the persecution" of other persons, within the meaning of Section 13 of the DPA, without proof that he personally committed, or knew of, acts of persecution within the concentration camp. Pet. 9-15. Petitioner's contention is erroneous.

The court of appeals correctly held that petitioner's service as an armed guard at the concentration camp sufficiently established assistance in persecution. In *Fedorenko* v. *United States*, 449 U.S. 490 (1981), this Court held that, under the DPA, "an individ-

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[3] The court also observed that, although proof of petitioner's "actual knowledge" of the events occurring inside Sachsenhausen was "unnecessary" to a conclusion that he assisted in persecuting its inhabitants, the court found petitioner's assertion of ignorance "belied by the fact that he guarded concentration camp prisoners who wore colorcoded patches to signify their racial, ethnic, social or political status." Pet. App. 9 n.8. Petitioner's assertion of ignorance was similarly belied by the fact that his "primary job was to escort prisoners to and from forced labor sites" where "[s]ome collapsed at work, and many later died from the combined effects of starvation and exhaustion." *Ibid.*

ual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." *Id.* at 512. The Court emphasized the plain language of the statute, the legislative history, and the administrative history, in which service as an armed guard at a concentration camp was consistently found to disqualify an individual from visa eligibility. *Id.* at 512-513. Considering a continuum of behavior beginning with the passive cutting of prisoners' hair and ending with service as an armed guard at a concentration camp, the Court held that the latter clearly constituted assistance in persecution:

> [T]here can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.

449 U.S. at 512-513 n.34.[4]

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[4] *Fedorenko* involved a slightly different statutory provision from the provision at issue here. *Fedorenko* concerned Section 2(b) of the DPA, and the IRO Constitution's definition of displaced persons that it incorporated. See note 1, *supra*; *Fedorenko*, 449 U.S. at 495 & nn.3 and 4. The IRO Constitution excluded "[a]ny * * * persons who can be shown * * * to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations." Annex I, Pt. II, 62 Stat. 3051; *Fedorenko*, 449 U.S. at 495 n.4. Section 13 of the DPA was revised in 1950 to add to the DPA itself a very

The evidence against petitioner is similar to the evidence against Fedorenko. Like Fedorenko, petitioner was a guard at a concentration camp. Pet. App. 3-4. Like Fedorenko, petitioner guarded inmates while wearing a uniform and carrying a rifle and ammunition. *Id.* at 3. Like Fedorenko, petitioner was under orders to shoot at escaping prisoners. *Ibid.* Like Fedorenko, petitioner was paid a salary and took occasional leave. *Id.* at 26. Since the government sufficiently established each of those elements, the court of appeals did not err in upholding petitioner's denaturalization.[5]

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similar prohibition based on assistance in persecution. See Act of June 16, 1950 ch. 262, § 11, 64 Stat. 227 (excluding "any person who * * * assisted in the persecution of any person because of race, religion, or national origin"). Both provisions thus barred individuals found to have "assisted in" persecution. Petitioner has not claimed that any difference in the provisions requires a different analysis of the assistance in persecution issue, and such a claim would not be tenable.

[5] As noted, in *Fedorenko*, this Court took note of the fact that Fedorenko admitted to shooting at escaping inmates. 449 U.S. at 512 n.34. Petitioner attempts to distinguish *Fedorenko* on the basis that he made no such admission. Pet. 12. Petitioner's reliance on that statement, however, focuses on a single statement taken out of context and ignores the thrust of this Court's decision, *i.e.*, that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa." 449 U.S. at 512. In *United States* v. *Kairys*, 782 F.2d 1374, 1378, cert. denied, 476 U.S. 1153 (1986), the Seventh Circuit explained that the fact of Fedorenko's shooting distinguishes his "position as a camp guard from those concentration camp *survivors* who were forced to perform tasks within the camp. Thus in cases not involving armed guards * * *, a showing of personal involvement in persecutions may be necessary. Nonetheless, *Fedorenko* continues to stand for the proposition that service as an armed guard equals persecution."

Petitioner nevertheless argues that he was impermissibly found to have assisted in persecution because of his "status" as an armed concentration camp guard and not because of any particular conduct in which he personally engaged. Pet. 9. Yet, by preventing inmates from escaping, an individual serving as an armed guard at a concentration camp necessarily performed functions "contributing to the collective effort of the Nazis to persecute innocent civilians." Pet. App. 10. See also *Schellong* v. *INS*, 805 F.2d 655, 660-661 (7th Cir.) ("Nazi concentration camps were places of persecution; individuals who, armed with guns, held the prisoners captive and prodded them into forced labor with threats of death or capital punishment cannot deny that they aided the Nazis in their program of racial, political and religious oppression."), cert. denied, 481 U.S. 1004 (1986); *Kulle* v. *INS*, 825 F.2d 1188, 1192 (7th Cir. 1987), cert. denied, 484 U.S. 1042 (1988). Indeed, the court of appeals explicitly emphasized the persecutive acts in which petitioner admitted engaging as part of his service as an armed guard—carrying a gun, wearing the uniform of the Death Head's Battalion, guarding various "persecuted peoples and forc[ing] them to do the bidding of the Third Reich," preventing those persecuted peoples from fleeing, and subjecting them to forced labor under "unspeakably brutal" conditions. Pet. App. 12.

Petitioner's contention that he should not have been found to have assisted in persecution without proof that he personally committed or knew of the atrocities within the concentration camp would add a new statutory condition to Section 13 of the DPA. That provision is broadly directed at any individual who "assisted in * * * persecution" based on race, religion,

or national origin. In *Fedorenko*, this Court rejected a similar request to create a requirement not found in the statute itself. As the Court explained, "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it." 449 U.S. at 513, quoting *Detroit Trust Co.* v. *The Thomas Barlum*, 293 U.S. 21, 38 (1934). That principle of statutory construction is equally applicable here.[6]

2. Petitioner contends that the court of appeals' decision conflicts with decisions from the Second and Ninth Circuits. Pet. 16-22. That contention is incorrect.

Petitioner relies on *United States* v. *Sprogis*, 763 F.2d 115 (2d Cir. 1985), and *Laipenieks* v. *INS*, 750 F.2d 1427 (9th Cir. 1985). As the Seventh Circuit has previously pointed out, however, both decisions are distinguishable from the situation presented by an armed guard at a concentration camp. *Schellong* v. *INS*, 805 F.2d 655, 661, cert. denied, 481 U.S. 1004 (1986). Both *Sprogis* and *Laipenieks* concerned, not concentration camp guards, but local policemen who were not involved in the operation of concentration camps (and who were not members of the SS). See *Sprogis*, 763 F.2d at 122-123; *Laipenieks*, 750 F.2d at 1429. Unlike the responsibilities of a local policeman, the duties of a concentration camp guard necessarily entailed assistance in the persecution of inmates. No court of appeals decision has held that

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[6] As in *Fedorenko*, 449 U.S. at 498-500, 513, moreover, uncontroverted evidence before the district court establishes the contemporaneous administrative interpretation, in which known concentration camp guards were routinely denied entry visas on the ground that their service as guards rendered them ineligible for visas. Pet. App. 32-34.

service as an armed guard at a concentration camp is insufficient to establish assistance in persecution. Accordingly, there is no conflict among the circuits meriting this Court's review.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] In light of petitioner's reliance on the Ninth Circuit's *Laipenieks* decision, we note that a recent unpublished decision from that court has held that proof of service as a guard at the Auschwitz concentration camp is sufficient to establish participation in persecution. *United States* v. *Paal*, No. 90-10480 (July 5, 1991), slip op. 3 n.2.

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